(13)

No. 91-1600

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HAZEN PAPER COMPANY, *et al.*,
Petitioners,
v.
WALTER F. BIGGINS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

STEVEN S. ZALEZNICK
CATHY VENTRELL-MONSEES *
AMERICAN ASSOCIATION OF RETIRED PERSONS
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

* Counsel of Record

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INTEREST OF AMICUS CURIAE

The American Association of Retired Persons (AARP) is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity, and purpose.

More than one-third of AARP's thirty-four million members are employed, most of whom are protected by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA). One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and poli-

cies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and retain older workers, and to help older workers overcome the obstacles they face because of age.

AARP concurs with the arguments set forth by respondent in his brief and will not repeat those arguments here. Rather, AARP's brief will focus on how the *Thurston* standard properly implements the ADEA's two-tiered liability scheme. Given the potential ramifications of this case for victims of age discrimination, AARP submits its brief *amicus curiae*[1] to facilitate a full consideration by the Court of this issue.

STATEMENT OF THE CASE

AARP adopts the Respondent's statement.

SUMMARY OF ARGUMENT

This case involves virtually the identical issue[2] resolved by this Court less than eight years ago in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)—the proper standard for determining willfulness in an ADEA disparate treatment case.[3] A unanimous Court in

[1] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[2] Petitioners also present a second issue concerning pension vesting. As discussed in Argument II, *infra*, AARP submits that this case does not present the issue articulated by petitioners in their Petition for a Writ of Certiorari, or even the issue as recast by petitioners in their brief on the merits.

[3] The arguments presented by petitioners in this case echo those made by the *Thurston* petitioners, who warned that "any time there is a finding of disparate treatment (even when it is inferred), liquidated damages *automatically* result." Petitioners' Brief at 31, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (No. 83-997) (emphasis in original). *See* Petitioners' Brief at 6, *Hazen Paper Co. v. Biggins*, (No. 91-1600), arguing that the reckless disregard standard "authorizes such damages in *every* case where disparate treatment is found under the ADEA." (Emphasis in original).

Thurston rejected arguments that equated proof of willfulness with proof of underlying intent to discriminate, as urged by petitioners here. The Court held that a violation of the ADEA is willful when the "employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 469 U.S. at 126.

The only distinction put forth by petitioners between this case and *Thurston* is that the facts here involve an individual case of discrimination, whereas *Thurston* challenged discrimination in a company policy. Thus, the question is whether the standard for willfulness should depend on the nature or scope of the employment decision. AARP respectfully submits that the creation of different standards of willfulness based on whether the employer acts against one individual or many is illogical. Moreover, petitioners' attempt to redefine "willful" as requiring proof of outrageous conduct in individual cases is contrary to the statutory language and purposes of the ADEA's liquidated damages provision.

The *Thurston* standard effectively implements the ADEA's two-tiered liability scheme and fully comports with the language, structure, and purposes of the ADEA. This case presents no reason to diverge from that standard.

I. THURSTON'S KNOWING OR RECKLESS DISREGARD STANDARD PROPERLY IMPLEMENTS THE TWO-TIERED LIABILITY SCHEME OF THE ADEA.

A. The Knowing Or Reckless Disregard Standard Maintains The Distinction Between Intentional Discrimination And A Willful Violation Of The ADEA.

Petitioners contend that the *Thurston* standard does not "fit" individual disparate treatment cases. Petitioners' Brief at 38. The flaw in petitioners' argument is its failure to distinguish between proof of an employer's in-

tent to discriminate and proof of the employer's knowledge that his specific conduct is prohibited by the ADEA. The *Thurston* standard recognizes this critical distinction, and properly implements the two-tiered liability scheme for damages crafted by Congress. 469 U.S. at 128.

The first tier of liability under the ADEA examines whether the employer treated the employee differently based on age.[4] If age was a determining factor in the employment decision, then the employer has violated the ADEA and is liable for ordinary damages.[5] Employers who discriminate but act reasonably (or even unreasonably) in determining their legal obligation incur only first-tier liability. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988). Disparate treatment, standing alone, does not render an employer liable for liquidated damages.

The second tier of liability requires proof of a willful violation. 29 U.S.C. § 626(b). To prove willfulness, the employee must show that the employer made the employment decision knowing his conduct violated the ADEA, or that the employer acted with reckless disregard for whether his conduct was prohibited by the ADEA. *Thurston*, 469 U.S. at 126. The second tier of liability subjects employers to double damages when they do not make any reasonable effort to determine whether their actions would constitute a violation of the law. *Thurston*, 469 U.S. at 126, citing *Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951).

[4] Proof of differential treatment varies from case-to-case and may be shown by direct evidence, *Thurston*, 469 U.S. at 121, by circumstantial evidence under the *McDonnell Douglas* test, *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), or by disparate impact. *Holt v. Gamewell Corp.*, 797 F.2d 36 (1st Cir. 1986).

[5] S. Rep. No. 723, 90th Cong., 1st Sess. 7 (1967) ("The purpose of this legislation, simply stated, is to insure that age . . . is not a determining factor . . .").

The key to the "knowing or reckless disregard" standard is its focus on the employer's consideration of whether his employment decision in a particular situation is prohibited by the ADEA. General knowledge of the existence of laws against age discrimination would not satisfy the "knowing" prong of the standard.[6] Rather, the inquiry must focus on the employer's knowledge as applied to the specific discriminatory conduct challenged by the employee,[7] which will vary from case-to-case.

Thurston itself illustrates the distinct inquiries required by the two tiers of liability which separate intentional discrimination from a willful violation of the law. As to the first tier of liability, the Court found that TWA's decision to adopt an age-based transfer policy intentionally discriminated against older pilots. 469 U.S. at 121. In assessing willfulness, the Court examined

[6] *See Coston v. Plitt Theatres, Inc.*, 860 F.2d 834, 837 (7th Cir. 1988) ("The term 'knew' . . . refers to the fact that the employer knew he was violating the ADEA, not to the fact that he was aware of the Act.") *Contra Dreyer v. Arco Chemical Co.*, 801 F.2d 51, 656 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987) (concluding that the *Thurston* standard did not fit individual cases because knowledge that discrimination is unlawful could be inferred from mere posting of ADEA notices in the workplace).

[7] For example, if an employer terminates an employee based on that employee's age and the employer knows that his decision is prohibited by the ADEA, then that employer willfully violated the law. *Dolgin v. Shearson Lehman Hutton, Inc.*, 714 F. Supp. 369, 370 (N.D. Ill. 1989) ("If [the employee] is able to prove that [the employer] actually believed that terminating [the employee] violated the ADEA, she may recover liquidated damages.") If the employer decides to terminate an older employee based on his age and does not know that his conduct is covered by the ADEA, then the question is whether he acted in "reckless disregard" of the law. The "reckless disregard" prong of the standard is met when an employer "acts without interest or concern for its employees' rights under the ADEA at the time it decides to discharge an employee; that is without making any reasonable effort to determine whether the decision to discharge violates the law." *Benjamin v. United Merchants and Mfrs., Inc.*, 873 F.2d 41, 44 (2d Cir. 1989).

whether TWA made an effort to determine whether the age-based policy violated the ADEA. Because TWA had made reasonable and good faith efforts [8] to "bring its retirement policy into compliance with the ADEA," the Court concluded that TWA's actions were not willful. *Id.* at 130. Thus, while TWA's efforts to comply with the law did not prevent first-tier liability, they did prevent second-tier liability.

The Seventh Circuit's analysis in *EEOC v. Century Broadcasting Co.*, 957 F.2d 1446 (7th Cir. 1992), exemplifies a proper application of the *Thurston* willfulness standard in an individual disparate treatment case. In *Century Broadcasting*, the defendant radio station was found to have willfully violated the ADEA when it discharged all of its announcers over the age of 40 and retained a 27-year-old announcer without auditioning any of the older announcers for the station's new format. The court specifically noted that the station had not "introduc[ed] any evidence that [they had] met with the company's attorneys to inquire whether the plan . . . would violate the ADEA." *EEOC v. Century Broadcasting*, 957 F.2d at 1459.

A court's consideration of an employer's inquiry into its legal obligations is only one example of many in which an award of liquidated damages may not automatically follow a finding of intentional discrimination. The exemptions [9] and affirmative defenses [10] of the ADEA present a variety of instances [11] for distinguishing between intentional discrimination and willful violations.[12]

Through the ADEA's liquidated damages provision, Congress created an incentive for employers to inquire responsibly whether their conduct complies with the ADEA before they make an employment decision. Those employers who make an honest effort to "determine their legal obligation[s]" [13] under the ADEA will not be subject

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[8] It is well-settled that the ADEA does not incorporate the good faith defense of Section 11 of the Fair Labor Standards Act, 29 U.S.C. § 260. *Thurston*, 469 U.S. at 129, n.22. However, "the same concerns [of good faith and reasonableness] are reflected in the proviso to Section 7(b) of the ADEA." *Id.* The relevance of an employer's asserted good faith depends on the particular facts of the case. *See EEOC v. Board of Governors*, 957 F.2d 424, 428 (7th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3829 (U.S. May 28, 1992) (No. 91-1895); *Price v. Marshall Erdman & Assocs.*, 966 F.2d 320, 323 (7th Cir. 1992); *Kuepferle v. Johnson Controls, Inc.*, 713 F. Supp. 171, 173 (M.D.N.C. 1988) (defendant's attempt to ascertain the legality of his proposed action to discharge the plaintiff by contacting corporate headquarters "tends to rebut any inference of reckless disregard").

[9] *See, e.g., Hysell v. Mercantile Stores Co.*, 736 F. Supp. 457, 460 (S.D. N.Y. 1989) (No evidence of willfulness where after receiving counsel's letter that plaintiff's position came under the "bona fide executive" exemption to the ADEA, 29 U.S.C. § 631(c) (1988), the company forced the plaintiff to retire). *But see Price v. Marshall Erdman & Assocs.*, 966 F.2d 320 (7th Cir. 1992). The Seventh Circuit's analysis in *Price* exemplifies a proper application of the "reckless disregard" prong of the *Thurston* standard with respect to the employer's obligations under the ADEA. The court explained:

> The jury was entitled to find that Erdman's conduct fell on the reckless side of the line. Erdman had so far neglected its responsibilities for compliance with the age discrimination law as to allow a supervisory employee to whom it had delegated the power to hire and fire to remain ignorant of one of the most basic features of the law—namely the age at which workers are protected by it.

Price v. Marshall Erdman & Assocs., 966 F.2d at 324.

[10] *See, e.g., EEOC v. O'Grady*, 857 F.2d 383, 388 (7th Cir. 1988) (mere failure to establish a BFOQ defense does not necessarily mean that the employer's conduct was willful).

[11] *See, e.g., Aledo-Garcia v. Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354, 357 (1st Cir. 1989) (No liquidated damages for discharging 70-year-old on day before effective date of the 1986 amendments to the ADEA since the "application of the amendment was a real question in controversy").

[12] *See also* examples cited in EEOC Br. at 13-14; National Employment Lawyers Association Br. at 10.

[13] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988).

to liquidated damages. Congress has made it clear, however, that those employers who act knowing their conduct violates the ADEA or who recklessly disregard the ADEA in acting will be subject to liquidated damages.

B. The *Thurston* Standard Properly Applies To Individual Discriminatory Treatment.

The only reason asserted by petitioners for distinguishing *Thurston's* definition of willfulness under the ADEA is that *Thurston* involved a discriminatory policy and this case involves discrimination against an individual.[14] The question is whether this distinction requires a different and more onerous standard of willfulness to maintain the two-tiered scheme in individual cases. AARP respectfully submits that *Thurston's* knowing or reckless disregard standard properly implements the ADEA's two-tiered liability scheme regardless of the nature of the employment decision or the number of individuals effected by the employment decision.

The inquiry underlying first-tier liability for disparate treatment does not depend on whether the treatment occurs in the context of a decision to terminate an individual or in a decision to adopt a policy to terminate a group of individuals. The ultimate issue remains the same—did the employer intentionally discriminate? *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983) (courts should not lose sight of ultimate issue in a discrimination case.) Indeed, proof of discriminatory intent was a central issue in the "policy"

[14] While petitioners also attempt to distinguish *Thurston* as a disparate impact case, Petitioners' Brief at 38, they are clearly mistaken. Disparate impact cases involve facially neutral policies. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 978 (1988). *Thurston* was a disparate treatment case that challenged a facially discriminatory policy. 469 U.S. at 121. *See Burlew v. Eaton Corp.*, 869 F.2d 1063, 1065 n.4 (7th Cir. 1989).

case of *Thurston*, from which petitioners seek to distance themselves.[15]

Similarly, the inquiry for determining liability under the second tier is no different in an individual case than it is in a policy case as discussed above. Indeed, the *Thurston* standard derives from a Second Circuit decision in an individual discriminatory treatment case, namely *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981). The Second Circuit explained in *Thurston*:

> As we indicated in *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981), in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.

See Air Line Pilots Ass'n v. Trans World Airlines, Inc., 713 F.2d 940, 956 (2d Cir. 1983), *aff'd in part, rev'd in part, sub nom., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Since the *Thurston* standard, when properly applied as in this case, maintains the ADEA's two-tiered scheme, there is no compelling reason to adopt a different standard for individual discrimination cases.

C. Creating Different Standards Of Willfulness Under The ADEA Is Contrary To The Language, Structure, And Purposes Of The ADEA.

Petitioners urge the Court to redefine willful in Section 7(b) of the ADEA to require proof of "outrageous

[15] The petition for *certiorari* in *Thurston* stated the question presented on willfulness as follows:

> Whether specific intent to discriminate is necessary to establish a "willful" violation under the Age Discrimination in Employment Act, an issue as to which the Courts of Appeals are sharply divided?

Petition for *Certiorari* in *Trans World Airlines, Inc. v. Thurston*, 465 U.S. 1065 (1984) (No. 83-997).

conduct" in individual disparate treatment cases. Petitioners essentially ask the Court to legislate a punitive damages standard[16] into the ADEA's willfulness provision. The imposition of such an onerous punitive damages standard for obtaining liquidated damages should be rejected by this Court because it is contrary to the language, structure, and purposes of the ADEA.

The ADEA uses the terms "liquidated damages" and "willful" in Section 7(b) to provide for an award of double damages. 29 U.S.C. § 626(b). The meaning and use of these terms at the time Congress incorporated them into the ADEA demonstrates that Congress did not intend to impose a punitive damages standard of outrageous conduct in ADEA Section 7(b).

At the time Congress enacted the ADEA, liquidated damages were a "well-known remedy" and were not regarded as "penalties." *Rex Trailer Co. v. United States*, 350 U.S. 148, 150-51 (1956). Rather, the function of liquidated damages was to provide a measure of recovery when damages are uncertain in nature or amount or unmeasurable. *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947). Consistent with this accepted understanding of liquidated damages, this Court ruled that the purpose of the FLSA's liquidated damages provision was to make the employee whole. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945), not to punish the employer. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942).[17]

[16] Petitioners argue, with support from the Third Circuit Court of Appeals in *Dreyer v. Arco Chemical Co.*, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987), that the outrageousness standard flows from *Thurston's* characterization of the ADEA's liquidated damages as "punitive in nature." *Thurston*, 469 U.S. at 125.

[17] As this Court has often noted, interpretations of the FLSA are relevant in interpreting the ADEA. *Thurston*, 469 U.S. at 126; *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). While the FLSA and ADEA's liquidated damages provisions are not identical, the

In *Thurston*, the Court also relied on the accepted meaning of the term "willful" at the time Congress employed it in the ADEA. 469 U.S. at 126-27. The Court's construction of "willful" to mean "knowing or reckless disregard comports with this principle of statutory construction. *See Lorillard v. Pons*, 434 U.S. 575, 583 (1978).

Interpreting "willful" to mean "outrageous" disregards the significant differences between the terms.[18] Outrageousness can be shown by evil motive, malice or bad purpose.[19] As Congress plainly acknowledged in enacting the ADEA, age discrimination typically does not result from malice.[20] Thus, this Court declined to adopt a standard for willfulness under the ADEA that required proof of evil motive, malice[21] or bad purpose. *Thurston*, 469 U.S. at 126 n.19.

addition of the willfulness criterion to the ADEA's liquidated damages provision does not erase its compensatory origin. *See Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1, 6, 7, & nn.8, 9 (1st Cir. 1989).

[18] The application of the terms "willful" and "outrageous" in the punitive damages context demonstrates that the terms are not interchangeable. To justify an award of punitive damages, "the conduct must not only be willful and malicious, but it 'must also be aggravated and outrageous.'" *Miller v. United States*, 945 F.2d 1464, 1467 n.3 (9th Cir. 1991), *quoting Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675, 680 (1986). Willfulness may be an element of outrageous conduct, but outrageousness is not a necessary component of willfulness. In other words, conduct may be "willful" but not "outrageous," under the common-law punitive damages standard. *Mariner Water Renaturalizer of Washington, Inc. v. Aqua Purification System*, 665 F.2d 1066, 1071 (D.C. Cir. 1981) (*per curiam*).

[19] Restatement (Second) of Torts § 908(2) 1977.

[20] "The discrimination older workers have most to fear . . . is not from any employer malice." U.S. Department of Labor, *The Older American Worker: Age Discrimination in Employment* 3 (1965).

[21] In contrast, Congress' recent provision of punitive damages in the Civil Rights Act of 1991 illustrates that Congress specifies when

"[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard v. Pons*, 434 U.S. 575, 583 (1978) *quoting Standard Oil Co. v. United States*, 221 U.S. 1, 9 (1911). Given the well-known meaning of the terms "liquidated damages" and "willful" at the time Congress enacted the ADEA, it is clear that Congress did not intend the provision for double damages under ADEA Section 7(b), 29 U.S.C. § 626(b), to function as a punitive damages provision requiring proof of outrageous conduct.

A punitive damages standard is not only contrary to the language of the ADEA, it is contrary to the statutory framework as well. Petitioners argue that an individual victim of discrimination would have to satisfy not only the two tiers identified in *Thurston*, but an additional and more onerous punitive damages standard of outrageous conduct. This would effectively add a third tier of proof in individual cases that is simply inconsistent with the ADEA's structure.

Moreover, petitioners' attempt to recast the ADEA's liquidated damages as punitive damages would defeat the purposes of the liquidated damages provision. Congress sought to combine the deterrent effect of the willfulness component in FLSA § 16(a), 29 U.S.C. § 216(a), with the compensatory purpose embodied in FLSA § 16(b)'s,

it requires proof of malice or is imposing a punitive damages standard. Under the Civil Rights Act of 1991, punitive damages are available where the employer acted with "malice or reckless indifference to the federally protected rights of an aggrieved individual." Pub. L. No. 102-166, § 1981A(b)(1), 105 Stat. 1071 (1991). *See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984); *United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991) ("congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated.")

29 U.S.C. § 216(b), double damages.[22] While the ADEA's liquidated damages may "furnish an effective deterrent to willful violations," 113 Cong. Rec. 2199 (1967) (Statement of Sen. Javits), they also compensate the victim of discrimination for nonpecuniary losses. *See* H.R. Conf. Rep. 950, 95th Cong., 2d Sess. 13-14 (1978).[23]

Finally, the outrageous conduct standard is wholly inappropriate for the ADEA because it would not deter the very discrimination that Congress found to be so serious and prevalent:

> What we have learned, essentially, is that a great deal of the problem stems from pure ignorance; there is simply the widespread irrational belief that once men and women are past a certain age they are no longer capable.

113 Cong. Rec. 31256 (1967) (Statement of Sen. Young). By enacting the ADEA, Congress declared that such

[22] Liquidated damages may have a deterrent effect without becoming punitive damages. *Priebe & Sons, Inc. v. United States*, 332 U.S. at 411. Punitive damages serve many functions and purposes in addition to deterrence. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 297 (1989) (O'Connor, J., concurring, in part, and dissenting in part) (citing numerous Supreme Court cases recognizing the penal nature of punitive damages).

[23] Congress recognized the compensatory function of the ADEA's liquidated damages provision in providing jury trials for such claims:

> Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury. The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942).

H.R. Conf. Rep. 950, 95th Cong., 2d Sess. 14 (1978).

ignorance and ageist stereotypes would no longer be tolerated. The 'knowing or reckless disregard' standard fulfills Congress' commitment to eliminate age discrimination from the workplace.[24]

II. AN EMPLOYER'S INTERFERENCE WITH AN EMPLOYEE'S PENSION BENEFITS MAY BE EVIDENCE OF AGE DISCRIMINATION.

AARP concurs with the position of respondent and the EEOC that the issue concerning pension vesting as stated in the Petition for a Writ of *Certiorari* is not presented by the record or the lower court decisions in this case.[25] In their brief on the merits, petitioners present an entirely new issue attacking the overall finding of ADEA liability, which they claim is based on pension vesting, and not on age.[26]

Should the Court review an issue concerning the evidence of pension vesting in this case, AARP submits that

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[24] For these reasons, AARP disagrees with the proposition raised by the dissent in *EEOC v. Century Broadcasting Co.*, 957 F.2d 1446 (7th Cir. 1992), that "unconsciously motivated [age discrimination] provides a basis for distinguishing between willful and non-willful discrimination in disparate treatment cases." 957 F.2d at 1466. (Manion, J., dissenting). Employers who act based on unfounded assumptions and stereotypes about older workers recklessly disregard the clear commands of the ADEA, whether their motivation is conscious or unconscious.

[25] Respondent's Brief at 32-36; EEOC's Brief at 21-22.

[26] Again, this question is not appropriate for review since it was neither presented nor preserved in the petition for *certiorari*. It is the long-established jurisprudence of this Court that consideration of a case will be limited to those questions specifically raised in the petition for a writ of *certiorari*, to the exclusion of other questions involved in the assertions of error in the supporting briefs. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938); *Rorick v. Devon Syndicate*, 307 U.S. 299 (1939). Further, the Court has expressed its disapproval of the practice of smuggling additional questions into a case after the granting of *certiorari*, stating that "[t]he issues here are fixed by the petition . . . ." *Irvine v. California*, 347 U.S. 128, 129 (1954).

the legal principle in question is whether such evidence may be relevant proof of age discrimination. Every circuit to address the issue has answered yes to that question. *See Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1421 (9th Cir. 1992); *Benjamin v. United Merchants and Mfrs. Inc.*, 873 F.2d 41, 43 (2d Cir. 1989); *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1466 (5th Cir.), *cert. denied*, 493 U.S. 843 (1989); *White v. Westinghouse Electric Co.*, 862 F.2d 56, 62 (3d Cir. 1988).

Despite the weight of authority against their position petitioners contend that pension status has no relevance to a claim of age discrimination. Surely, the fact that petitioners terminated Mr. Biggins knowing he would lose his right to a pension is relevant to assessing their treatment of him. In this case, depriving Mr. Biggins of pension benefits was a potent threat because petitioners knew that Mr. Biggins' age made these benefits particularly valuable to him.

The relevant of evidence of an employer's interference with pension vesting or benefits will vary as much as the facts of age discrimination vary from case-to-case. Whether such evidence may support a claim of age discrimination is for the finder of fact to decide.[27] Based on all of the evidence in this case, including the evidence related to pension vesting, the jury, as affirmed by the district court and court of appeals, concluded that petitioners discriminated against Mr. Biggins. That finding should not be disturbed.

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[27] It is not the role of the appellate court to second-guess the determination of the jury. *EEOC v. Century Broadcasting Co.*, 957 F.2d at 1457.

CONCLUSION

For the foregoing reasons, AARP respectfully submits that the judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

STEVEN S. ZALEZNICK
CATHY VENTRELL-MONSEES *
AMERICAN ASSOCIATION OF
RETIRED PERSONS
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

Dated: September 8, 1992

* Counsel of Record